HERMAN ANDO

v.

TACTLAND DEVELOPMENT SDN BHD & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RAUS SHARIF JCA
SULONG MATJERAIE JCA
[CIVIL APPEALS NOS: W-02-207-2004, W-02-1021-2004, W-02-34-2007 & W-02-1098-2008]
16 JULY 2009

CIVIL PROCEDURE: *Contempt of court - Failure to comply with court order - Punishment for contempt - Whether sentence of imprisonment proper*

CIVIL PROCEDURE: *Injunction - Principles to be applied in granting injunction - Whether serious questions to be tried in existence - Whether balance of convenience in favour of the grant of injunction - Whether damages an adequate remedy*

CIVIL PROCEDURE: *Judgment and orders - Alteration of - Judge altering own judgment/order after entering the same - Whether judge empowered to review, rehear, vary or set aside own judgment/order after formally recording the same - Whether judge was functus officio - Whether judgment/order altering or varying earlier judgment/order a nullity*

CIVIL PROCEDURE: *Judgments and orders - Setting aside or varying judgments and orders - Application to expunge order - Order made in ignorance of terms agreed between the parties - Whether such order should be expunged*

The defendant's construction works at a project site caused extensive damage to the plaintiff's house. The plaintiff filed a writ and applied for injunctive relief against the defendant. On 10 February 2004, Azmel J granted the plaintiff a prohibitive injunction preventing the defendant from further developing the project site; and a mandatory injunction compelling the defendant to immediately rectify or repair the damage to the plaintiff's house. Subsequently, on the plaintiff's contempt motion, Azmel J on 28 April 2004 granted leave to cite the defendant's directors for contempt for failing to rectify the damage to the plaintiff's house.

A However on 30 August 2004, Azmel J, on the defendant's application, varied the orders granted on 10 February 2004 in that the Judge clarified that the injunction given was solely for the purpose of restraining the defendant from carrying out any further construction works at the project site and was not a mandatory B injunction compelling the defendant to immediately rectify or repair the plaintiff's damaged house. Thereafter, Abdul Malik Ishak J (as he then was) heard the plaintiff's contempt motion and on 20 December 2006, the defendant's two directors were found guilty and were each sentenced to three weeks' imprisonment and C a fine of RM15,000 in default one month's imprisonment. Further thereto, on 10 December 2007 the plaintiff and the defendant attempted to clarify Azmel J's decision of 30 August 2004 before Mohd Yazid JC. Both parties produced a draft order on terms agreed upon and requested Mohd Yazid JC to approve it. Instead D Mohd Yazid JC approved the draft order on terms he perceived to be in line with the terms ordered by Azmel J. The plaintiff applied to set aside or expunge the order approved by Mohd Yazid JC but this application was dismissed. Out of these convoluted proceedings, four appeals arose. The first appeal was E filed by the defendant and against the decision of Azmel J on 10 February 2004 granting the plaintiff the injunctive relief sought. The second appeal was filed by the plaintiff and in respect of Azmel J's purported variation of his own order of 10 February 2004 granted on 30 August 2004. The third appeal was filed by F the defendant's directors against Abdul Malik Ishak J's conviction and sentence for contempt. The plaintiff filed the fourth appeal and against the decision of Mohd Yazid JC dismissing his (plaintiff's) application to expunge the order made on different terms than what was agreed upon by the plaintiff and defendant.

G

Held (dismissing the first and third appeals with costs, but allowing the second and fourth appeals with costs)
Per Raus Sharif JCA:

H **(1)** There were clearly serious issues to be tried and a strong *prima facie* case to justify the injunctive relief granted to the plaintiff. The facts deposed in this case, raised serious questions to be tried and to be inquired into further. The balance of convenience and the importance of maintaining the I *status quo* clearly lay with the plaintiff. The damages caused to the plaintiff's house were structural cracks, and damages could not possibly be an adequate remedy considering that the

premises was a family home and that the plaintiff should not be put to further risk and destruction of the house, if remedial works were not affected by the defendant. The first appeal as filed by the first defendant should therefore be dismissed with costs. *American Cynamid Co v. Ethicon Ltd* (refd); *Keet Gerald Francis Noel John v. Mohd Noor & Ors* (refd). (paras 21, 22, 23 & 24)

(2) A court has no power in the same action, to alter or vary a judgment regularly obtained after the judgment has been entered or drawn up, except under the slip rule pursuant to O. 20 r. 11 of the Rules of the High Court 1980. Thus concerning the second appeal, the question whether the Court could have given the mandatory injunction had been dealt with on merit in the plaintiff's application for injunctive orders. The issue could not be re-opened. Azmel J had no power to review, rehear, vary or set aside any part of his judgment after it had been formally recorded. Azmel J was *functus officio*. His order of 30 August 2004 was thus a nullity. The second appeal ought to be decided in the plaintiff's favour with costs. *William Laurie v. George Lees* (dist); *In re Surire, Mellor v. Surire* (dist); *Hock Hua Bank v. Sahari bin Murid* (FC) (foll). (paras 26, 27, 28, 29 & 30)

(3) At the contempt proceedings before Abdul Malik J, both the defendant's directors had admitted to breaching the mandatory injunction. Both directors defied Azmel J's order while having full knowledge of the intent and purpose of the order. At the contempt proceedings, they did not claim ignorance of the terms nor raise the issue that the mandatory injunction had been set aside. On the facts, the directors had not only committed contempt by not obeying the court order, but by their own conduct had interfered with the due administration of justice. There was no reason for the court to disturb the findings and orders of Abdul Malik J. There was also no reason for the court to interfere with the sentence of imprisonment imposed against the defendant's directors. The third appeal ought to therefore be dismissed with costs. (paras 33, 34, 36, 37, 38, 39, 40 & 41)

(4) The plaintiff's application to expunge was made in relation to the order approved by Mohd Yazid JC on the basis that the JC had totally ignored what had been agreed between the parties. The parties were in a better position than the JC to

know what had actually transpired before Azmel J and the JC should have thus approved the order as agreed by the parties. The JC should have allowed the plaintiff's application. The plaintiff's appeal, *viz.* the fourth appeal should therefore be allowed with costs. (paras 42, 43, 44, 45, 46 & 47)

Bahasa Malaysia *Translation Of Headnotes*

Kerja-kerja pembinaan defendan di sebuah tapak projek telah mengakibatkan kerosakan yang sungguh banyak pada rumah plaintif. Plaintif memfail satu writ dan memohon untuk mendapat relif secara injunski terhadap defendan. Pada 10 Februari 2004, Azmel H memberikan plaintif suatu injunski larangan yang menghalang defendan dari memajukan selanjutnya tapak projek itu; dan suatu injunksi mandatori yang memaksa defendan untuk membetulkan atau membaiki kerosakan pada rumah plaintif. Kemudiannya, atas usul penghinaan plaintif, Azmel H pada 28 April 2004 memberikan kebenaran untuk menamakan pengarah-pengarah defendan atas penghinaan kerana gagal membetulkan kerosakan pada rumah plaintif. Walau bagaimanapun, pada 30 Ogos 2004, Azmel H, atas permohonan defendan, mengubah perintah-perintah yang diberi pada 10 Februari 2004 di mana Hakim menjelaskan bahawa injunksi yang diberi adalah hanya bagi tujuan menghalang defendan dari menjalankan lebih kerja-kerja pembinaan di tapak projek itu dan bukan suatu injunksi mandatori yang memaksa defendan untuk membetulkan atau membaiki rumah plaintif yang rosak. Selepas itu, Abdul Malik Ishak H (beliau pada masa itu) membicara usul penghinaan plaintif dan pada 20 Disember 2006, kedua-dua pengarah defendan telah didapati bersalah dan dihukum pemenjaraan selama tiga minggu dan denda sebanyak RM15,000 dalam ketiadaan satu bulan pemenjaraan. Selepas itu, pada 10 Disember 2007 plaintif dan defendan cuba untuk menjelaskan keputusan Azmel H bertarikh 30 Ogos 2004 di hadapan Mohd Yazid PK. Kedua-dua pihak mengemukakan suatu draf perintah atas terma-terma yang telah disetujui dan meminta Mohd Yazid PK meluluskannya. Sebaliknya Mohd Yazid PK meluluskan draf perintah atas terma-terma yang beliau berpendapat selaras dengan terma-terma yang diarahkan oleh Azmel H. Plaintif memohon untuk mengenepikan atau memadamkan perintah yang diluluskan oleh Mohd Yazid PK tetapi permohonan itu telah ditolak. Dari prosiding berbelit-belit ini, empat rayuan berbangkit. Rayuan pertama difail oleh defendan dan menentang keputusan Azmel H pada 10 Februari 2004 yang membenarkan plaintif relif

bersifat injunksi yang dituntut. Rayuan kedua telah difail oleh plaintif dan berhubung dengan pengubahan yang dikatakan oleh Azmel H terhadap perintahnya bertarikh 10 Februari 2004 yang dibenarkan pada 30 Ogos 2004. Rayuan ketiga telah difail oleh pengarah-pengarah defendan terhadap sabitan dan hukuman bagi penghinaan oleh Abdul Malik Ishak H. Plaintif memfail rayuan keempat dan menentang keputusan Mohd Yazid PK menolak permohonan plaintif untuk memadamkan perintah yang dibuat atas terma-terma yang berlainan dari yang telah disetujui oleh plaintif dan defendan.

Diputuskan (menolak rayuan-rayuan pertama dan ketiga dengan kos, tetapi membenarkan rayuan-rayuan kedua dan keempat dengan kos)
Oleh Raus Sharif HMR:

(1) Jelas terdapat isu-isu serius untuk dibicara dan satu kes *prima facie* yang kuat untuk menjustifikasi relif injunksi yang diberi kepada plaintif. Fakta-fakta yang didepos dalam kes ini, membangkitkan soalan-soalan serius untuk dibicara dan untuk disiasat selanjutnya. Imbangan konveniens dan kepentingan mengekalkan *status quo* jelas berada dengan plaintif. Kerosakan yang terjadi pada rumah plaintif merupakan rekahan struktural, dan ganti rugi tidak mungkin boleh menjadi suatu remedi yang mencukupi memandangkan bahawa premis itu adalah sebuah rumah keluarga dan bahawa plaintif tidak seharusnya menanggung lebih banyak risiko dan kemusnahan pada rumah itu, jika kerja-kerja pemulihan tidak dijalankan oleh defendan. Rayuan pertama yang difail oleh defendan pertama seharusnya, oleh itu, ditolak dengan kos. *American Cynamid Co v. Ethicon Ltd* (dirujuk); *Keet Gerald Francis Noel John v. Mohd Noor & Ors* (dirujuk).

(2) Sebuah mahkamah tidak ada kuasa dalam tindakan yang sama, untuk menukar atau mengubah satu penghakiman yang diperolehi mengikut aturan selepas penghakiman itu telah dicatat atau dibuat, kecuali di bawah kaedah khilaf mengikut A. 20 k. 11 Kaedah-kaedah Mahkamah Tinggi 1980. Oleh itu berkenaan dengan rayuan kedua, soalan sama ada mahkamah mungkin telah memberi injunksi mandatori telahpun diselesaikan atas merit dalam permohonan plaintif untuk perintah-perintah injunksi. Isu itu tidak boleh dibuka semula. Azmel H tidak mempunyai kuasa untuk mengkaji semula, membicara semula, mengubah atau mengenepikan mana-mana bahagian

penghakimannya selepas ia telah direkod secara formal. Azmel H adalah *functus officio*. Perintahnya bertarikh 30 Ogos 2004 oleh yang demikian merupakan suatu pembatalan. Rayuan kedua sepatutnya diputuskan memihak kepada plaintif dengan kos. *William Laurie v George Lees* (dibezakan); *In re Surire, Mellor v. Surire* (dibezakan); *Hock Hua Bank v. Sahari bin Murid* (FC) (diikuti).

(3) Di prosiding penghinaan di hadapan Abdul Malik H, kedua-dua pengarah defendan telah mengaku melanggar injunksi mandatori itu. Kedua-dua pengarah telah mengingkari perintah Azmel H walaupun mereka mempunyai pengetahuan penuh mengenai niat dan tujuan perintah itu. Di prosiding penghinaan, mereka tidak mendakwa bahawa mereka tidak tahu terma-terma ataupun membangkitkan isu bahawa injunksi mandatori itu telah diketepikan. Atas fakta-fakta, pengarah-pengarah tidak hanya melakukan penghinaan dengan tidak mengikuti perintah mahkamah, tetapi melalui kelakuan mereka sendiri telah campur tangan dengan pentadbiran keadilan. Tiada sebab bagi mahkamah mengusik dapatan-dapatan dan perintah-perintah Abdul Malik H. Juga tiada sebab bagi mahkamah bercampur tangan dengan hukuman pemenjaraan yang dikenakan terhadap pengarah-pengarah defendan. Rayuan ketiga oleh itu seharusnya ditolak dengan kos.

(4) Permohonan plaintif untuk memadamkan telah dibuat berkaitan dengan perintah yang diluluskan oleh Mohd Yazid PK atas dasar bahawa PK telah tidak mengendahkan sepenuhnya apa yang telah disetujui di antara pihak-pihak. Pihak-pihak berada dalam kedudukan yang lebih bagus dari PK untuk mengetahui apa yang sebenarnya berlaku di hadapan Azmel H dan PK sepatutnya meluluskan perintah seperti yang disetujui oleh pihak-pihak. PK sepatutnya membenarkan permohonan plaintif. Rayuan plaintif, iaitu rayuan keempat seharusnya dibenarkan dengan kos.

Case(s) referred to:

American Cynamid Co v. Ethicon Ltd [1975] AC 39 ***(refd)***

Hock Hua Bank v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

In re Surire, Mellor v. Surire [1885] 30 Ch 230 ***(dist)***

Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(refd)***

William Laurie v. George Lees [1881] 7 AC 19 ***(dist)***

Legislation referred to:
Rules of the High Court 1980, O. 20 r. 11, O. 42 r. 13
Rules of the Supreme Court 1957, O. 28 r. 11

For the plaintiff - Ashokvijay Sanghrajka (Paari Perumal with him); M/s TK Wong, Tan & Assoc
For the defendant - Tuan Hj Sulaiman Abdullah (A Nedu Maran with him); M/s Nedu Maran & Partners

Reported by Andrew Christopher Simon

JUDGMENT

Raus Sharif JCA:

Introduction

[1] There are four inter-related appeals involving the same parties before the court. With the agreement of the parties, this court heard the four appeals together. The appeals are:

(i) W-02-207-04

An appeal by the defendant against the decision of Azmel Maamor J (as he then was) on 10 February 2004 in ordering interim injunctive orders (prohibitory and mandatory) against the defendant (1st appeal).

(ii) W-02-1021-04

An appeal by the plaintiff against the decision of Azmel Maamor J on 30 August 2004 in reviewing the mandatory injunction ordered against the defendant that he had granted on 10 February 2004 (2nd appeal).

(iii) W-02-34-07

An appeal by Tan See Siong and Soe Bank Tee (the defendant's directors) against the decision of Abdul Malik Ishak J (as he then was) on 20 December 2006 in finding the defendants' directors guilty for contempt and sentenced each of them to three weeks imprisonment and a fine of RM15,000 and in default thereof to one month imprisonment (3rd appeal).

(iv) W-02-1098-08

An appeal by the plaintiff against the decision of Mohd Yazid Mustafa JC on 15 September 2008, in dismissing the plaintiff's application to expunge the order in allowing the defendant's application to regularise and reseal the order of Azmel Maamor J dated 30 August 2004 (4th appeal).

Factual Background

[2] The material facts leading to these appeals are as follows. The defendant is a development company. They were developing 26 units of double story terrace houses on Lot 286, Taman Megah, Off Jalan Shell Gate, Bandar Port Dickson ("the project site"). The plaintiff is the owner of a house situated on a piece of land adjacent to the project site.

[3] It is the plaintiff's case that as a result of the earthworks carried out by the defendant's contractors, who had dug into the ground, there is a considerable degree of voids beneath the porch and driveway concrete slap of the plaintiff's house. It causes surface cracks as well as structural cracks affecting the foundation and safety of the plaintiff's house.

[4] On 23 March 2003, the plaintiff filed a writ against the defendant. In his statement of claim, the plaintiff prayed for:

(i) An injunction to restrain the defendant by itself or by its servants or agents or otherwise from further carrying out development works on the project site.

(ii) An injunction whereby the defendant is required forthwith to carry out repairs of the damage and cracks on the plaintiff's house.

(iii) Damages; and

(iv) Costs.

[5] The plaintiff thereafter filed a summons in chambers, applying for an interim injunction. The prayers sought by the plaintiff in the summons in chambers were identical to the prayers sought in the statement of claim.

[6] On 10 February, after hearing the parties, Azmel Maamor J (as he then was) granted orders in terms of the plaintiff's prayers in the summon in chambers. In effect, Azmel Maamor J granted in favour of the plaintiff:

(i) Prohibitive injunction, preventing the defendant from further developing the land; and

(ii) Mandatory injunction, asking the defendant to rectify or repair whatever damages and cracks on the plaintiff's house.

[7] A notice of appeal was filed by the defendant against Azmel Maamor J's decision. Hence, the 1st appeal.

[8] After the above decision, there were various applications made by both parties before Azmel Maamor J. The relevant applications were:

(i) Plaintiff's notice of motion dated 7 May 2004 to cite the defendant's directors, Mr. Tan See Siong and Soe Bank Tee for contempt for failing to obey the mandatory injunction ie, to immediately repair the damages and cracks on the plaintiff's house.

(ii) Defendant's summons in chambers dated 26 June 2004 seeking *inter alia*:

(a) Whether the court had in fact, besides granting an interlocutory injunction restricting the defendant from carrying the works of the development side, had also granted a mandatory injunction whereby the defendant was ordered to immediately repair the damages and cracks on the plaintiff's house which were allegedly caused by the defendant's construction work on the development side.

(b) In the event, the court had in fact not granted the mandatory injunction, then it is prayed that the order of the court made on 10 February 2004 be accordingly amended to reflect the actual orders made on 10 February 2004 and when so amended be resealed by the duly authorised officer of the court.

[9] In regard to the plaintiff's notice of motion, Azmel Maamor J on 28 April 2004 granted leave to cite the defendants' directors for contempt. With regard to the defendant's summons in chambers, Azmel Maamor J on 30 August 2004, granted the following orders:

(i) The injunctive order given on 10 February 2004 was for the purpose of restraining the defendant from carrying out the works on the project site.

(ii) The Court did not give the mandatory injunctive order wherein the defendant was ordered immediately to carry out the repairs of the damages and cracks which were allegedly caused by the development works on the project site.

[10] A notice of appeal was filed by the plaintiff against the decision of Azmel Maamor J in varying the orders that he had earlier made on 10 February 2004. Hence, the 2nd appeal.

[11] The defendant did not file its defence. The plaintiff accordingly applied for leave to enter judgment in default of defence and for assessment of damages. On 18 May 2005, leave to enter judgment in default of defence was allowed against the defendant with damages to be assessed before the senior assistant registrar.

[12] On 24 February 2006, the senior assistant registrar ordered damages in the sum of RM99,000 with interest and costs. The registrar's certificate in respect thereof was issued and served on the defendant. But the defendant did not make the payment.

[13] Subsequently the contempt motion was heard by Abdul Malik J (as he then was). On 20 December 2006, the defendant's directors were found guilty. Each of them were sentenced to three weeks imprisonment and a fine of RM15,000 in default thereof to one month's imprisonment.

[14] Both the directors filed a notice of appeal against the conviction and sentence. Hence, the 3rd appeal.

[15] On 10 December 2007, counsel for the plaintiff and the defendant appeared before Mohd Yazid Mustapha JC for clarification of Azmel Maamor J's decision of 30 August 2004. Counsel for both parties have had earlier produced a draft order with amended terms that they have agreed upon and requested

Mohd Yazid Mustapha JC to approve it and a fair copy was to be issued out. However, Mohd Yazid Mustapha JC did not approve the order as agreed by the parties. Instead he approved the draft order which he perceived to be in line with the terms granted by Azmel Maamor J.

[16] The plaintiff then by encl. 163 applied for the order as approved by Mohd Yazid Mustapha JC to be set aside or expunged. The application was dismissed.

[17] A notice of appeal was filed by the plaintiff against the said decision. Hence, the 4th appeal.

[18] I will deal with the appeals in turn.

1st Appeal (W-02-207-04)

[19] This is the defendant's appeal. The defendant is appealing against the interlocutory injunctive orders granted by Azmel Maamor J on 10 February 2004 which stated that:

(i) the defendant was restrained from further carrying out the development work (prohibitory order); and

(ii) the defendant was required to carry out repairs of the damage and cracks of the plaintiff's house forthwith (mandatory order).

[20] It was the contention of the defendant that the above orders should not have been granted because the plaintiff had failed to show any nexus between the said development and the alleged cracks on the plaintiff's house. It was further contended that the second order that the defendant was to carry out repairs of the damages and cracks on the plaintiff's house, amount to a mandatory injunction. It should not have also been granted because the plaintiff had not shown that he had an unusually strong and clear case and that there are special circumstances before the court to grant the relief.

[21] With utmost respect, I disagree. Clearly, based on the facts of this case, there are serious issues and strong *prima facie* case to justify the decision in granting those injunctions. It is not in dispute that the defendant is the developer engaged in the development of the land adjacent to the plaintiff's house. It is also not in dispute that there was no other construction work going on at the adjacent land to the plaintiff's house. The only

construction works carried out there was that of the defendant's. Hence, it is not unreasonable to conclude that the cracks to the plaintiff's house must be of the result of the earthworks done by the defendant's contractors. In fact, the defendant had neither said that it had not removed the soil beneath the plaintiff's house nor denied removing the soil.

[22] In cases of this nature, the central issue is whether or not the plaintiff has demonstrated that there exists a serious question to be tried which warrants the grant of the interim injunctions so as to enable the court to preserve the *status quo* pending the full adjudication of the issues raised in the writ of summons and the statement of claim. I would also add that at this juncture, what is required is for the plaintiff to establish that there exists a serious question to be tried and that the balance of convenience lies in favour of granting the injunction. (See *American Cynamid Co v. Ethicon Ltd* [1975] AC 396 and *Keet Gerald Francis Noel John v Mohd Noor & Ors* [1995] 1 CLJ 293).

[23] The facts deposed in this case, raised serious questions to be tried and inquired into further. The balance of convenience and the importance of maintaining the *status quo* clearly lie with the plaintiff. The damages caused to the plaintiff's house were structural cracks and damages could not possibly be an adequate remedy considering the fact that the premises is a family home and that the plaintiff should not be put to further risk and destruction of the house if remedial works are not affected by the defendant.

[24] For the above reasons, the defendant's appeal must be dismissed with costs. The deposit of this appeal to the plaintiff on account of taxed costs. The orders of Azmel Maamor J is therefore affirmed.

2nd Appeal (W-02-1021-04)

[25] This is the plaintiff's appeal. The main issue in this appeal is whether Azmel Maamor J has the power to review his own order that he made on 10 February 2004. As stated earlier, Azmel Maamor J, upon application by the defendant had set aside the mandatory injunction he had earlier granted on 10 February 2004. In setting aside the mandatory injunction, Azmel Maamor J stated that "when I gave the order on 10 February 2004, I had only intended to give the prohibitive injunction and not the mandatory injunction".

[26] Tuan Hj. Sulaiman bin Abdullah ("Hj. Sulaiman"), learned counsel for the defendant, submitted that Azmel Maamor J has the inherent jurisdiction and power, quite apart from O. 20 r. 11 of the Rules of the High Court 1980 ("RHC") to correct his own records and to bring the orders pronounced and extracted into line with the real intention. In support, he cited the House of Lords case of *William Laurie v. George Lees* [1881] 7 AC 19 where Lord Penzance said:

> I cannot doubt that under the original powers of the Court, quite independent of any order that is made under the Judicature Act, every Court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the Court to vary them in such a way as to carry out its own meaning, and where language has been used which is doubtful, to make it plain. I think that power is inherent in every court.

[27] Reliance was also placed to the case of *In re Surire, Mellor v. Surire* [1885] 30 Ch 230 where Cotton LJ said:

> This application of somewhat unusual nature – a motion to an order after it has been passed and entered. The Court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the Court in fact had never adjudicated upon them, in my opinion, it has jurisdiction, which it will in a proper case exercise, to correct its records, that it may be in accordance with the order really pronounced.

[28] With utmost respect, the above two cases have no application to the facts of the present case. The Federal Court in *Hock Hua Bank v. Sahari bin Murid* [1980] 1 LNS 92 had clearly held that the court had no power under any application in the same action to alter or vary a judgment regularly obtained after it had been entered or after it is drawn up, except under the slip rule in O. 28 r. 11 Rules of the Supreme Court 1957 (which is O. 20 r. 11 of the Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court.

[29] In the present case, the defendant's application is not confined to the slip rule under O. 20 r. 11 of the Rules of the High Court 1980. Instead what the defendant wanted was for the court to alter or vary the order which had been entered against the defendant. I am of the view that the question whether or not the court could have given the mandatory injunction had been

dealt upon hearing the arguments on merit in the plaintiff's application for injunctive orders. Therefore, the issue cannot be re-opened and Azmel Maamor J must be precluded from doing so upon the doctrine of *functus officio*. In short, Azmel Maamor J has no power to review, rehear, vary or set aside part of any judgment once it has been formally recorded. He was *functus officio*. Hence, the order made on 30 August 2004 was therefore a nullity.

[30] Accordingly, the plaintiff's appeal must be allowed with costs. The order of Azmel Maamor J is therefore set-aside. The deposit is to be refunded to the plaintiff.

3rd Appeal (W-02-34-07)

[31] This is the defendant directors' appeal. Abdul Malik Ishak J had found both of them guilty for contempt and sentenced each of them to three weeks imprisonment and a fine of RM15,000 in default thereof to one month imprisonment. Before us, the arguments by Hj. Sulaiman in support of this appeal are in two folds:

(i) The learned judge was wrong to enforce the order dated 10 February 2004 by way of committal proceedings because as at the date of the committal order dated 20 December 2006, the mandatory injunction order dated 10 February had been set aside.

(ii) The mandatory injunction was ambiguous, uncertain or indefinite which made it void an thus cannot be made a basis for contempt proceeding and the defendant's directors against whom such order purports to run cannot be guilty of contempt of court in disregarding it.

[32] Mr. Ashok, learned counsel for the plaintiff argued by stating that the committal proceeding was based on the failure of the defendant to repair the plaintiff's house as ordered by the High Court. The order to repair the plaintiff's house was made on 10 February 2004, but the defendant's directors had chosen to do nothing about it. Mr. Ashok further submitted that there was nothing ambiguous about the order. According to him, the two directors knew exactly what they were supposed to do.

[33] With respect, there are merits in Mr. Ashok's arguments. The issues that the mandatory injunction had been set-aside or the mandatory injunction was ambiguous, uncertain or indefinite and thus void, were never raised during the contempt proceedings before Abdul Malik Ishak J. In fact, the defendant knew fully well of the terms of the injunctive orders sought by the plaintiff. This is due to the fact that the plaintiff obtained the injunctive orders after a lengthy and protracted *inter parte* hearing. It was vigorously contested for a period of over one year and the defendant throughout have had the benefit of legal advice. That explain the reasons why the defendant's directors did not during the contempt hearing raise any complaint of ambiguity of the injunctive orders. Neither was the issue that the mandatory injunction had been set-aside ever taken nor raised before Abdul Malik Ishak J.

[34] In fact at the hearing before Abdul Malik J, both the defendant's directors have admitted breaching the mandatory injunction. Both of them have apologised to the court for their failure to comply with Azmel Maamor J's order dated 10 February 2004. This can clearly be seen from the evidence recorded from both the defendant's directors.

[35] The defendant's director, Mr. Tan See Siong, during cross-examination said the following:

> Q. Was there any remedial works commenced by the defendant on the plaintiff's house?
>
> A. No, Yang Arif.
>
> Q. You did not pay the damages amounting to RM99,000.00?
>
> A. Yes, not paid yet.
>
> Q. Any other step you took to comply with the injunction order?
>
> A. No.

[36] Mr. Tan See Siong further made the following admission under cross-examination:

> I admit that I knew fully well about the order dated 10.2.2004. And for two years, I have done nothing to repair the house.

[37] The other director, Mr. Soe Bank Tee during cross-examination by learned counsel for the plaintiff testified as follows:

Q. Have you repaired the house?

A. Not until today.

Q. Were you advised to obey the injunctive order?

A. Yes.

Q. You agree with me that the injunctive order stipulate that you must repair the house and nothing done for the last 2 years?

A. Yes.

Q. You did not comply with YA Dato' Azmel's direction as per page 22 of bundle F.

A. No (took time to reply).

Q. Were you advised to pay the assessment of the damages of RM99,000.00?

A. Yes. As of today (referring to 28.11.2006), no steps were taken to pay the RM99,000.00.

Q. Will you pay the judgment sum of RM99,000.00 inclusive of interest by today (referring to 28.11.2006)?

A. Not today, but will pay later.

Q. When will you pay?

A. I don't know.

At the moment, I do not have the means to pay RM99,000.00.

[38] It is clear from the above, that both the defendant's directors have admitted in not complying with the order of Azmel Maamor J. Thus, Abdul Malik Ishak J was justified when he concluded:

> After two years 10 month 10 days down the road (calculated from 10.2.2004 to 20.12.2006), both the contemnors have yet to repair the damages and cracks to the plaintiff's house. The photographs exhibited in the affidavits speak volumes in favour of the plaintiff. To say the least, both the contemnors have been flippant in tendering their apologies without showing any remose or sincerity. Both contemnors have failed to purge their contempt. They adopted an arrogant and defiant stand in challenging the legality of the injunctive order. It was an exhibition of total defiance. They displayed their flagrant disregard to the orders of Azmel Maamor J (now FCJ). Sad to say, both the contemnors have treated this contempt proceedings with disclaim and they equated it 'like a walk in the park' and Soe Bank Tee has the audacity to tell this court that he would pay the assessed damages awarded by the SAR at a later date line 'as though he is buying a bric-a-brac in the flea market'.

[39] It is clear that the defendant's directors have deliberately in defiance of the court's order. They have had full knowledge of the intent and purpose of the order of Azmel Maamor J but decided not to obey. At the contempt proceedings they did not claim ignorant of the terms of the order on the ground of ambiguity. Neither did they raise the issue that the mandatory injunctive order had been set-aside. Thus, the arguments of Hj. Sulaiman has no merit. The cases cited by him to support his arguments are also of no application to the facts of the present case. On the facts of this case, the defendant's directors have had not only committed contempt by not obeying the court order, but by their own conduct have interfered with the due administration of justice.

[40] Accordingly, there is no reason for this court to disturb the finding and orders of Abdul Malik Ishak J. In the circumstances of this case, there is also no reason for this court to interfere with the sentence of imprisonment imposed against the defendant's directors.

[41] For the reasons that I have given, I would dismiss the defendant's directors' appeal with costs and confirm their convictions and sentences imposed upon them. The deposit of the appeal to the plaintiff on account of taxed costs.

4th Appeal (W-02-1098-08)

[42] This is the plaintiff's appeal. It is in relation to encl. 163. The issue is whether Mohd Yazid Mustapha JC was right in deciding not to approve the draft order in relation to Azmel

A Maamor J's decision of 30 August 2004 as agreed by the parties. In other words, was the learned Judicial Commissioner right on his own accord in fairing the order based on what he perceived from the minutes of Azmel Maamor J.

B **[43]** The learned Judicial Commissioner's reasoning of dismissing encl. 163 was solely made on the ground that the plaintiff's application falls short of O. 42 r. 13 RHC 1980 in that the application to set-aside or expunge was done after an expiry of 30 days from the date of the order. According to him, encl. 163 C was filed on 31 January 2008 ie, almost four years after the order was granted by the learned judge.

[44] With utmost respect, I find that the learned Judicial Commissioner had missed the point. The plaintiff's application was not to vary the order of Azmel Maamor J of 30 August 2004. In D fact, they had appealed against the said decision (2nd Appeal). What the plaintiff intended to achieve by encl. 163 was to set-aside the fair copy issued by the learned Judicial Commissioner. The reason being the learned Judicial Commissioner had totally ignored what had been agreed between the parties. E

[45] There is merit on the plaintiff's complaint. Since those parties were present before Azmel Maamor J when 30 August 2004 order was given they are in the best position to know what the order should be. They are in the better position than the F Judicial Commissioner to know what had actually transpired before Azmel Maamor J four years ago. The learned Judicial Commissioner should have approved the order as agreed by the parties. Accordingly, he should have allowed the application made by the plaintiff in encl. 163.

G

[46] For the above reasons, the plaintiff's appeal must be allowed with costs. The order of the learned Judicial Commissioner is therefore set-aside. The deposit of this appeal is to be refunded to the plaintiff.

H

[47] My learned brothers Gopal Sri Ram, JCA (now FCJ) and Sulong Matjeraie, JCA have read this judgment in draft and have expressed their agreement to make it the judgment of the court.

I